Supreme Court, U.S.
FILED

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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CENTRAL CARTAGE CO.,

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND and HOWARD McDOUGALL, Trustee, and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND and HOWARD MCDOUGALL, Trustee,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit erred in not following precedents of the Fourth and Eighth Circuits and *dicta* of the Ninth Circuit and instead followed precedent from the Eleventh Circuit refusing jurisdiction under 28 U.S.C. § 1292(a)(1) to review an interlocutory order of a district court which denied Central Cartage's motion to compel arbitration.

LIST OF RESPONDENTS

Respondents, collectively styled "Funds", are: Central States, Southeast and Southwest Areas Pension Fund and Howard McDougall, Trustee, and Central States, Southeast and Southwest Areas Health and Welfare Fund and Howard McDougall, Trustee.

STATEMENT OF CORPORATE AFFILIATION

Pursuant to Rule 29.6, Central Cartage Co. submits that it is a wholly-owned subsidiary of CenTra, Inc. CenTra, Inc. has no parent company. Central Cartage Co. has no direct or indirect ownership interests in any other company except for wholly-owned subsidiaries.

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Central Cartage Co. ("Cartage" or "Petitioner") respectfully petitions this Court to issue a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit entered on May 28, 1996.

OPINIONS BELOW

The Order of the United States District Court for the Northern District of Illinois is set forth in Appendix A. The Judgment of the Court of Appeals is set forth in Appendix B. The Opinion of the United States Court of Appeals for the Seventh Circuit is set forth in Appendix C, and is reported at Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Co., 84 F.3d 988 (7th Cir. 1996).

JURISDICTION

The Opinion and Judgment of the Seventh Circuit Court of Appeals dismissing the appeal of Central Cartage for lack of jurisdiction were entered on May 28, 1996.

On June 12, 1996, Central Cartage filed its Motion For Stay Of Mandate Pending Petition For Writ Of Certiorari on the basis that: (i) there is a "reasonable probability" that four Justices of this Court would consider the issue presented herein sufficiently meritorious to grant certiorari; (ii) there is a "fair prospect" that a majority of this Court would conclude that the decision of the Seventh Circuit Court of Appeals was erroneous; (iii) irreparable harm will result from a denial of a stay; and (iv) a balancing of the equities regarding harm to the parties favored a stay.

On June 19, 1996, after consideration of the motion and of the response of Respondents herein, the Court of Appeals granted Central Cartage's motion and stayed issuance of its

mandate until this Court had the opportunity to grant a writ of certiorari. A copy of the Order is attached at Appendix D.

Jurisdiction in this Court is based upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The construction of 28 U.S.C. § 1292(a)(1) is primarily at issue in this case. A copy of that statute follows and is attached at Appendix E.

28 U.S.C. § 1292(a)(1) provides that:

> (a) the courts of appeals shall have jurisdiction of appeals from:
>
> > (1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

On February 7, 1994, the Funds filed suit against Central Transport Inc. ("Transport") and Petitioner Central Cartage Co. ("Central Cartage") for pension fund contributions pursuant to ERISA, 29 U.S.C. §1001 et seq. The Funds alleged that Transport and Central Cartage failed to make all required contributions "which the employee work history it reported to the Pension Funds revealed to be owed for the period of December 29, 1991 through January 31, 1994, and by failing to accurately and completely report the work history of all covered employees and pay contributions on their behalf."

Central Cartage and Transport are obligated to make payments to the Funds under the terms of a series of collective bargaining agreements entered into between the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("IBT") and employer associations, which represent Central Cartage and Transport. The National Master Freight Agreement for the period of April 1, 1991 to March 31, 1994 ("NMFA") was the collective bargaining agreement in effect during the period from 1991 to 1994. IBT, its local unions and the various employers simultaneously entered into four separately negotiated supplemental agreements which became integral parts of the NMFA.

Article 54 of the supplemental agreement to which Central Cartage was a party entitled "Health and Welfare Benefits" and Article 55 entitled "Pension" set forth the employers' obligation to contribute to the Funds. Those Articles also establish the procedure to be followed in the event that the parties disagree concerning health and welfare or pension contributions:

> Disputes or questions of interpretation concerning the requirement to make contributions on behalf of particular employees or classifications of employees shall be submitted directly to the Conference Joint Area Committee by either the Employer, the Local Union, or the Trustees [of the Funds]. (emphasis added).

On January 27, 1995, Central Cartage filed its Motion To Dismiss And Compel Alternative Dispute Resolution seeking to have the district court address the Funds' failure to exhaust their administrative remedies. Subsequent to the filing of the motion, the Funds voluntarily dismissed Transport as a defendant to this action.

In an opinion dated May 3, 1995, the district court denied Central Cartage's motion to dismiss and compel alternative dispute resolution. See Appendix A. The district court based such denial entirely on its conclusion that Central Cartage had waived its right to compel the Funds to submit their grievances to alternative dispute resolution by failing to bring its motion less than a year after the case was filed.

The district court accepted that Central Cartage's affirmative defenses, which stated that the Funds had not exhausted their administrative remedies, referred to the alternative dispute resolution provision in the applicable collective bargaining agreements. The district court, nonetheless, held that the case was governed by Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388 (7th

Cir. 1995) and that by participating in the lawsuit, conducting discovery and filing written status reports, Central Cartage had "waived any right it might have had to submit the dispute to the Conference Joint Area Committee".

After the district court entered its June 1, 1995 Order denying Central Cartage's motion for reconsideration, Central Cartage filed its Notice of Appeal on June 13, 1996 invoking the appellate jurisdiction of the United States Court of Appeals for the Seventh Circuit under 28 U.S.C. §1292(a)(1) (as the orders served as an injunction against arbitration) and under 9 U.S.C. § 16 (as a denial of arbitration under the Federal Arbitration Act).[1]

On May 28, 1996, the Seventh Circuit Court of Appeals for the Seventh Circuit rendered its decision dismissing Central Cartage's appeal for lack of appellate jurisdiction in Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Co., 84 F.3d 988 (7th Cir. 1996). A copy of the Court of Appeals decision is attached at Appendix C.

On June 12, 1996, Central Cartage filed its motion with the Seventh Circuit Court of Appeals seeking a stay of the mandate which, pursuant to Fed. R. App. P. 40(a) and 41(a), was issued on June 18, 1996. Central Cartage requested that the Seventh Circuit Court of Appeals stay the issuance of its mandate pending the filing of and final action by this Court on this Petition for writ of certiorari. Central Cartage cited and analyzed the factors to be considered in granting such a stay set

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[1]The Seventh Circuit found that the Federal Arbitration Act does not apply to the case at bar. This Petition does not seek review of that issue and is limited to whether appellate jurisdiction exists under 28 U.S.C. § 1292(a)(1).

forth by this Court in Rostker v. Goldberg, 448 U.S. 1306 (1980) (Brennan, J. in chambers):

> 1. That there is a "reasonable probability" that four Justices would consider the issue sufficiently meritorious to grant certiorari.
>
> 2. That there is a "fair prospect" that a majority of the Court would conclude that the decision below on the merits was erroneous.
>
> 3. That irreparable harm would result from the denial of a stay.
>
> 4. That a balancing of the equities regarding harm to the parties favored a stay.

Rostker, 448 U.S. at 1306, 1308 (1980) (Brennan, J., in chambers). The Seventh Circuit also requires satisfaction of its Circuit Rule 41(a)(3) that the party seeking the stay make "[a] substantial showing that the petition for certiorari which is being filed raises an important question meriting review by the Supreme Court."

On June 13, 1996, the Court of Appeals directed the Funds to file a response to the motion by June 17, 1996. On June 19, 1996, the Court of Appeals issued its order granting Central Cartage's motion. A copy of the Court of Appeals decision granting the stay is attached hereto at Appendix D.

REASONS FOR GRANTING THE WRIT

The granting of a writ of certiorari in this case is appropriate pursuant to Rule 10(a) of the Rules of this Court for the reason that a United States Court of Appeals has entered a decision in conflict with the decisions of three other United States Courts of Appeals on the same important matter.

Central Cartage seeks a writ of certiorari to determine whether the Courts of Appeals have jurisdiction under 28 U.S.C. § 1292(a)(1) to review the interlocutory decision of a district court denying a motion to compel arbitration. The Seventh Circuit held that it lacks jurisdiction to review the denial of an arbitration proceeding in accordance with a similar finding made by the Eleventh Circuit. The Fourth and Eighth Circuits have held just the opposite and exercise such jurisdiction. The Ninth Circuit suggested in *dicta* that jurisdiction may exist to review orders denying arbitration but not orders compelling arbitration. The Third Circuit finds jurisdiction when the only relief being sought is the arbitration itself, but no jurisdiction when the trial court reasonably expects to issue orders in the future effectuating the arbitration decision.

This case further illustrates the split among the Circuits which developed since this Court's decision in Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988).

28 U.S.C. §1292(a)(1) provides that:

> (a) the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, . . . or of the judges

> thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

Central Cartage asserts that the Court of Appeals for the Seventh Circuit should have exercised its jurisdiction to review the district court's denial of Central Cartage's motion to compel arbitration in accordance with the precedents of the Fourth, Eighth and Ninth Circuits.

A.
A Split Of Authority Exists In The Circuits

The Seventh Circuit Court of Appeals itself recognized that its decision was in conflict with at least two and possibly three other circuit courts of appeals:

> . . . appellant urges us to follow two recent cases from the Fourth and Eighth Circuits holding that such orders [denying motions to compel arbitration] have the practical effect of refusing to grant an injunction. Kansas Gas & Elec. Co. v. Westinghouse Elec. Corp., 861 F.2d 420, 422 (4th Cir. 1988) (holding that orders denying arbitration have an injunctive effect and serious consequences because they force parties to undergo the expense of trial before being able to appeal); Nordin v. Nutri/System, Inc., 897 F.2d 339 (8th Cir. 1990) (same). See also Abernathy v. Southern California Edison, 885 F.2d 525, 527 n.9 (9th

> Cir. 1989) (holding that orders granting arbitration are not appealable, but observing that orders denying arbitration may come within the exception noted by Gulfstream and applied by the Fourth Circuit in Kansas Gas & Electric Co.).

Central States Pension Fund, 84 F.3d 988, 992; Appendix C, p.14a. The Court of Appeals specifically concluded that it would "decline to follow the Fourth and Eighth Circuits . . . ." but failed to offer any criticism of the reasoning of these decisions. Id.

The Seventh Circuit issued its order staying the issuance of its own mandate pending the filing of this Petition for certiorari.[2] In so doing, the Seventh Circuit again implicitly recognized that its denial of jurisdiction conflicted with recent decisions of the Fourth and Eighth Circuits, and with the Ninth Circuit's interpretation of the Gulfstream exception. Central States Pension Fund, 84 F.3d 988, 992; Appendix C, p. 14a. By staying its own mandate, the Seventh Circuit necessarily determined that there was a "fair prospect" that its decision was

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[2]A well recognized Supreme Court treatise characterized the task of the appellate lawyer seeking a stay of mandate from the Court of Appeals for the pendency of a Petition for Certiorari as follows:

> Counsel may . . . be faced with the anomalous task of persuading a court of appeals judge or panel, whose adverse ruling is the subject of the prospective petition for certiorari, that the issue involved is so substantial and the appellate ruling is so suspect that the Supreme Court is likely to grant review and perhaps reverse.

ROBERT L. STERN ET AL., SUPREME COURT PRACTICE §17.12 (7th ed. 1993).

erroneous. See Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).[3]

In fact, the Seventh Circuit also necessarily determined under its Circuit Rule 41(a)(3) that Central Cartage had made "[a] substantial showing that the petition for certiorari which is being filed raises an important question meriting review by the Supreme Court."

B.
Appellate Rights Are Being Determined By The Geographic Location Of The Trial Proceedings

The decision of the Seventh Circuit denies Central Cartage the same rights of review that are granted to similarly situated appellants in other jurisdictions strictly based upon the geographic location of the action.

28 U.S.C. § 1292(a)(1) provides appellate courts with jurisdiction of appeals from interlocutory orders of the district courts of the United States "granting, continuing, modifying, refusing or dissolving injunctions." The Seventh Circuit nonetheless denied appellate jurisdiction to hear Central Cartage's appeal based upon a misconstruction of this Court's decision in Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988).

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[3]The Seventh Circuit Court itself acknowledged in another case, United States v. Holland, 1 F.3d 454, 456 (7th Cir. 1993), that "[a] conflict among the circuits is an accepted basis for the granting of the writ of certiorari."

1. This Court Did Not Abrogate The Jurisdiction Of The Courts of Appeals Provided By Congress Under Section 1292(a)(1)

In Gulfstream, this Court held that "[a]n order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)." 485 U.S. 271, 279. The denial of a demand for arbitration deals with more than the mere conduct or progress of litigation before the district court. Moreover, this Court assured that interlocutory review was available where it was "truly needed":

> Section 1292(a)(1) will, of course, continue to provide appellate jurisdiction over orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunctions and have "serious, perhaps irreparable consequences."

485 U.S. 271, 287-88 (citation omitted). If arbitration is denied and the district court proceeds to trial, the benefits of reduced costs and speedy resolution through arbitration will be irretrievably lost.[4]

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[4]Inefficient management of the court system is directly contradictory to why Supreme Court justices encourage arbitration in some cases. *See* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276 (commenting that arbitration is not a "cure-all for the mushrooming caseloads of the courts, but [is] one example of a 'better way to do it.'"); William Rehnquist, *A Jurist's View of Arbitration*, 32 ARB. J. 1, 7 (1977) (stating that arbitration is an alternative to the costly and time consuming litigation process); Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 474 n.7 (1988) (applying the Warren and Rehnquist articles).

2. Circuit Courts Of Appeals In Three Other Circuits Have Found Appellate Jurisdiction To Exist

The Courts of Appeals in the Fourth and Eighth Circuits have recently found that the Circuit Courts of Appeals have jurisdiction to review the decisions of their district courts in granting or denying arbitration. The Ninth Circuit has suggested in *dicta* that it has jurisdiction to review denials of arbitration by the district courts in its circuit. The Third Circuit exercises jurisdiction when the only relief being sought is the arbitration itself but does not exercise jurisdiction when the trial court reasonably expects to issue orders in the future effectuating the arbitration decision.

A split in the Circuits has resulted through their differing interpretations and/or extensions of the decision of this Court in Gulfstream. In 1988, the Fourth Circuit commented at length about this Court overruling the Enelow-Ettelson doctrine. See J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 317-18 (4th Cir. 1988). In its evaluation, the Fourth Circuit noted that despite this Court overturning the Enelow-Ettelson doctrine, the doctrine was not intended to bar interlocutory appeals of orders granting or denying injunctions or those having serious or irreparable consequences. Id. The Fourth Circuit reaffirmed its belief that it has jurisdiction to review appeals of orders denying arbitration in Jeske v. Brooks, 875 F.2d 71 (4th Cir. 1989) (discussing its holding in J.J. Ryan and Kansas Gas & Electric).

The Opinion of the Seventh Circuit in the case at bar noted that the court was versed in the decisions of the Fourth Circuit rendered in Kansas Gas & Elec. Co. v. Westinghouse Elec. Co., 861 F.2d 420 (4th Cir. 1988) and of the Eighth Circuit rendered in Nordin v. Nutri/System, Inc., 897 F.2d 339

(8th Cir. 1990), which found jurisdiction under the same circumstances as the case at bar. Nonetheless, the Seventh Circuit chose to reject their conclusions and to rule just the opposite of the Fourth and Eighth Circuits.

In Kansas Gas & Elec. Co. v. Westinghouse Elec. Co., 861 F.2d 420, 422 (4th Cir. 1988), the Fourth Circuit held that a district court's order denying defendant's motion to compel arbitration was an appealable interlocutory order under Section 1292(a)(1). The Fourth Circuit noted that this Court's decision in Gulfstream did not prevent consideration of defendant's truly necessary appeal:

> We hold that orders denying arbitration do have an injunctive effect and have "serious, perhaps irreparable, consequence." The order is injunctive because it enjoins proceedings in another tribunal. It has serious consequences because of the "irreparable harm that exists when arbitration is denied ab initio. . . ." Taylor v. Nelson, 788 F.2d 220, 224 (4th Cir. 1986). If a party "must undergo the expense and delay of trial before being able to appeal, the advantages of arbitration -- speed and economy -- are lost forever." Alascom, Inc. v. ITT North Elec. Co., 727 F.2d 1419, 1422 (9th Cir. 1984).

Kansas Gas, 861 F.2d 420, 422. See also Peoples Sec. Life Ins. v. Monumental Life Ins., 867 F.2d 809, 811 (4th Cir. 1989) (appeal of order denying arbitration is an appeal of right under Section 1292(a)(1)).

The Eighth Circuit adopted the Fourth Circuit's reasoning in Nordin v. Nutri/System, Inc., 897 F.2d 339 (8th Cir. 1990). In Nordin, the defendant wanted to prevent

plaintiff, its former officer, from serving as an operational manager for a competitor in violation of his contractual obligation not to compete. Id. at 340-41. Defendant moved to compel plaintiff to submit to arbitration as provided in the parties' agreement. Id. at 341. The district court denied the motion and defendant appealed. Id.

The Eighth Circuit held that it had jurisdiction to consider defendant's appeal pursuant to Section 1292(a)(1). Id. at 342. The court explained that the denial of a motion to compel arbitration has an injunctive effect that "carries with it serious and perhaps irreparable consequences." Id. The court stated that a denial of a motion to compel arbitration "can only be effectively challenged on immediate appeal because the advantages of arbitration will be forever lost if the appeal is delayed." Id.

In Abernathy v. Southern California Edison, 885 F.2d 525 (9th Cir. 1989), the Ninth Circuit considered whether it had jurisdiction to review an order granting a stay of proceedings pending arbitration and an order compelling arbitration.[5] The Ninth Circuit in Abernathy noted in *dicta* that while an order granting arbitration was not appealable, an order denying arbitration may come within the exception noted by this Court in Gulfstream and applied by the Fourth Circuit in Kansas Gas & Electric Company.

The Third Circuit has also reviewed a matter dealing with an order staying proceedings and compelling arbitration.

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[5]The Ninth Circuit agreed with the First and Third Circuits concluding that orders compelling arbitration are not ordinarily appealable under Section 1292(a)(1). Abernathy, 885 F.2d 525, 528 *citing* VDA, DeFuertes v. Drexel, Burnham, Lambert, Inc., 855 F.2d 10, 11 (1st Cir. 1988); Zosky v. Boyer, 856 F.2d 554, 560-61 (3d Cir. 1988).

After finding that Section 1292(a)(1) did not apply, the court expressly noted that it was not deciding whether "an order denying a motion for arbitration is distinguishable for purposes of appealability from an order staying proceedings or compelling arbitration." Zosky v. Boyer, 856 F.2d 554, 561 n.9 (3d Cir. 1988).

3. The Court Of Appeals For The Seventh Circuit Agrees With The Position Taken By The Eleventh Circuit

The Eleventh Circuit in Administrative Management Services v. Royal American Managers, 854 F.2d 1272 (11th Cir. 1988), noted that the former Enelow-Ettelson doctrine required that the underlying action be one at law and the defense one at equity for appellate jurisdiction to be found under Section 1292(a)(1). The Eleventh Circuit then resurrected Enelow-Ettelson by concluding that Section 1292(a)(1) must not automatically provide jurisdiction or else the former Enelow-Ettelson doctrine would not have been so restrictive:

> It seems obvious that if orders granting or denying motions to compel arbitration were *per se* appealable as injunctions under § 1292(a)(1), it would have been unnecessary for the courts to go through the gyrations prescribed by the now defunct *Enelow-Ettelson* doctrine in order to assert jurisdiction.

Id. at 1279.

Even without regard to which approach is the correct interpretation of 28 U.S.C. § 1292(a)(1) and this Court's decision in Gulfstream, there can be little doubt that there are four separate and distinct positions[6] being taken among the Circuit Courts of Appeals:

1) Jurisdiction does not exist -- Seventh and Eleventh Circuits;

2) Jurisdiction exists -- Fourth and Eighth Circuits;

3) Jurisdiction may exist for review of orders denying arbitration but not for review of orders granting arbitration -- Ninth Circuit;

4) Jurisdiction exists when the only relief being sought is the arbitration itself, but jurisdiction does not exist when the trial court reasonably expects to issue orders in the future effectuating the arbitration decision -- Third Circuit.

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[6]The Funds asserted in their "Response of Plaintiffs-Appellees to Motion for Stay of Mandate Pending Petition for Writ of Certiorari" that the First Circuit would find jurisdiction to hear Central Cartage's appeal, citing Tejidos de Coamo v. Internat'l Ladies Garment Worker's Union, 22 F.3d 8 (1st Cir. 1994), but that the Fifth Circuit would deny jurisdiction in accordance with Jolley v. Paine Webber Jackson & Curtis, Inc., 864 F.2d 402, 403 (5th Cir. 1989). Those cases actually dealt with whether the Courts of Appeals have jurisdiction under Section 1292(a)(1) to review district court refusals to stay legal proceedings while arbitration is pending, rather than whether jurisdiction lies to review denials of the right to arbitration itself.

Central Cartage submits that the Seventh Circuit should have followed the holdings in Kansas Gas & Elec. Co. v. Westinghouse Elec. Co., 861 F.2d 420 (4th Cir. 1988) and Nordin v. Nutri/System, Inc., 897 F.2d 339 (8th Cir. 1990) and the *dicta* of Abernathy v. Southern California Edison, 885 F.2d 525, 527 n.15 (9th Cir. 1989) by finding jurisdiction under Section 1292(a)(1) to review the denial of arbitration by the district court. See also id. at 527 n.9 (cited by the Seventh Circuit in its opinion in the case at bar).

Central Cartage's ability to assert its rights in a nonjudicial forum will be irretrievably lost if the Seventh Circuit's denial of jurisdiction stands. Although an order granting arbitration only delays a party's access to judicial remedies, the denial of arbitration means that arbitration is effectively lost.

This case presents a single issue appeal which assures that the jurisdictional issue will be reviewed if certiorari is granted. Central Cartage did not choose the federal district court as the forum for decision making; the Funds filed the case in federal court. Central Cartage did nothing to affirmatively suggest that it wanted to follow any procedure of decision making other than arbitration.

CONCLUSION

The Seventh Circuit Court of Appeals addressed whether appellate jurisdiction exists to review denials of arbitration. In so doing, the Seventh Circuit furthered the split in the circuits. The various circuits hold as follows:

1) Jurisdiction does not exist -- Seventh and Eleventh Circuits;

2) Jurisdiction exists -- Fourth and Eighth Circuits;

3) Jurisdiction may exist for review of orders denying arbitration but not for review of orders granting arbitration -- Ninth Circuit;

4) Jurisdiction exists when the only relief being sought is the arbitration itself, but jurisdiction does not exist when the trial court reasonably expects to issue orders in the future effectuating the arbitration decision -- Third Circuit.

The Petition presents a single issue appeal under a viable federal statute. The confusion among the circuits will only be resolved if this Court addresses whether the Circuit Courts of Appeals have jurisdiction to immediately review denials of arbitration and clarify the questions concerning jurisdiction that have developed in the aftermath of this Court's decision in Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988).

Central Cartage respectfully requests that this Court grant Central Cartage's Petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

Order of the United States District Court for the Northern District of Illinois, dated May 3, 1995

Appendix A

Minute Order Form

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge:	Elaine E. Bucklo
Case Number:	94 C 774
Date:	May 3, 1995
Case Title:	Central States, et al. v. Central Transport, et al.
Docket Entry:	For the reasons stated herein, defendant Central Cartage Co.'s motion to dismiss and compel alternative dispute resolution is denied. (30-1,2)

For further detail see order on the reverse of the original minute order form.

Notices mailed by judge's staff.

Number of Notices: 2

Appendix A

(Reserved for use by the Court)

ORDER

Defendant Central Cartage Co.'s motion to dismiss and compel alternative dispute resolution is denied. Defendant waived any right that it might have had to submit the dispute to the Conference Joint Area Committee for resolution by failing to invoke such a provision for nearly a year after this case was filed. During that time, defendant participated in this lawsuit, conducted discovery and filed two written status reports. This case is therefore governed by the Seventh Circuit's decision in *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, No. 94-2872, 1995 WL 86415 (7th Cir. Mar. 3, 1995). Defendant's contention that this case is distinguishable on the ground that it preserved its right in its answer is rejected. In its answer, defendant raised 11 affirmative defenses. One was that plaintiffs had not exhausted their administrative remedies. Assuming this defense was even intended to refer to the issue raised by the present motion, defendant was obligated promptly to seek a stay or dismissal. I also reject defendant's contention that it did not have sufficient information to bring this motion earlier. In view of the continuing litigation between the parties, this contention is frivolous.

In view of my ruling on the issue of waiver, I have not addressed the additional reasons argued by plaintiff to preclude dismissal of this case as sought by defendant.

ENTER ORDER:

Elaine E. Bucklo
United States District Judge

Date: May 3, 1995

APPENDIX B

Judgment of the United States Court of Appeals for the Seventh Circuit, dated May 28, 1996

Appendix B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Dated: May 28, 1996

BEFORE: **Honorable** JOHN L. COFFEY, Circuit Judge

Honorable DANIEL A. MANION, Circuit Judge

Honorable MICHAEL S. KANNE, Circuit Judge

No. 95-2406

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND and HOWARD MCDOUGALL, Trustee,
Plaintiffs - Appellees

v.

CENTRAL CARTAGE COMPANY, a Michigan corporation,
Defendant - Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 94 C 774, Elaine E. Bucklo, Judge

The appeal is DISMISSED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

APPENDIX C

Opinion of the United States Court of Appeals for the Seventh Circuit, dated May 28, 1996

Appendix C

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, Central States, Southeast and Southwest Areas Health and Welfare Fund and Howard McDougall, Trustee,

Plaintiffs-Appellees,

v.

CENTRAL CARTAGE COMPANY, a Michigan Corporation, Defendant-Appellant.

No. 95-2406.

United States Court of Appeals,
Seventh Circuit.
Argued Jan. 3, 1996.
Decided May 28, 1996.

Before COFFEY, MANION and KANNE, Circuit Judges.

COFFEY, Circuit Judge.

Central States, Southeast and Southwest Areas Pension Fund (collectively the "Pension Fund") filed suit against Central Cartage Company pursuant to section 515 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1145, claiming that Central Cartage had failed to fulfill its contractual obligation to pay employer contributions to the plaintiffs' pension fund. Nearly a year after the suit was filed, Central Cartage moved to dismiss the case and compel alternative dispute resolution. The district court denied the motion, finding that Central Cartage had waived its rights to

arbitration or alternative dispute resolution. Central Cartage appeals; we dismiss for lack of appellate jurisdiction.

I. Background

Central Cartage is a Michigan corporation engaged in primarily local trucking. The company (along with other trucking companies) entered into a nationwide collective bargaining agreement (known as the National Master Freight Agreement, or "NMFA") with the International Brotherhood of Teamsters, spanning the period April 1, 1991 to March 31, 1994. Central Cartage also entered into a supplemental agreement with the Union specifically covering all "truck drivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers, and such other employees ... engaged in local pickup, delivery and assembling of freight."

The supplemental agreement contains a provision obligating Central Cartage to contribute to the Pension Funds for Central Cartage's employees. The agreement also provides for alternative dispute resolution:

> Disputes or questions of interpretation concerning the requirement to make contributions on behalf of particular employees or classifications of employees shall be submitted directly to the Conference Joint Area Committee by either the Employer, the Local Union, or the Trustees.

In February 1994, the Pension Funds filed suit against Central Cartage pursuant to the provisions of ERISA: The Pension Funds alleged that Central Cartage had intentionally misclassified certain employees as "casual" instead of "regular"

employees (which lowered the required level of contribution to the pension funds) and had failed to pay employer contributions owed to the Pension Fund on behalf of these employees.

In April 1994, Central Cartage answered the complaint, alleging eleven affirmative defenses, including the Pension Fund's failure to exhaust administrative remedies. In a status report to the district court in July 1994, Central Cartage noted an unresolved issue of whether the Pension Fund had failed to exhaust its administrative remedies.

In anticipation of trial the parties conducted discovery. Although the record is not clear whether discovery proceedings were completed, in January 1995, Central Cartage filed a motion in district court to dismiss the case and compel alternative dispute resolution, as provided for in the supplemental agreement to the collective bargaining agreement. The district court ruled that Central Cartage had waived its contractual right to any alternative dispute resolution because the company had failed to "promptly" invoke the provision in the agreement "until nearly a year after this case was filed," conducting discovery, and filing status reports. See Cabinetree of Wis. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390-91 (7th Cir.1995) (holding that failure of a party to promptly move for arbitration after litigation has been commenced against that party is presumptive evidence that it has waived any contractual right to arbitration). Central Cartage made a motion for reconsideration; the court denied it. Instead of proceeding to trial, Central Cartage appeals the decision of the district court denying its motion to dismiss the lawsuit and compel alternative dispute resolution.

II. Analysis

A threshold issue raised by the Pension Funds is our jurisdiction to review the appeal. Normally, only final judgments may be appealed. 28 U.S.C. § 1291; Carson v. American Brands, Inc., 450 U.S. 79, 83, 101 S.Ct. 993, 996, 67 L.Ed.2d 59 (1981). However, Central Cartage has asserted two grounds for appellate jurisdiction: 28 U.S.C. § 1292(a)(1) (jurisdiction to review certain interlocutory decisions) or in the alternative 9 U.S.C. § 16 (appellate jurisdiction under the Federal Arbitration Act). Each will be considered in turn.

A. Review of Interlocutory Decisions

Central Cartage asserts that the district court's action, denying the motion to compel arbitration, constituted in effect a refusal to order an injunction. Title 28 U.S.C. § 1292(a)(1) provides, with emphasis added:

> (a) [T]he courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, ... or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

However, "[a]n order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)." Gulfstream Aerospace Corp.

v. Mayacamas Corp., 485 U.S. 271, 279, 108 S.Ct. 1133, 1138, 99 L.Ed.2d 296 (1988).

Historically, district court orders refusing to compel alternative dispute resolution (most commonly arbitration) could fall within the ambit of section 1292(a)(1) under one of two theories: the Enelow-Ettelson doctrine, or the rationalization that the order had the practical effect of ruling upon an injunction. See Matterhorn, Inc. v. NCR Corp., 727 F.2d 629, 630 (7th Cir.1984).

Initially arising from the old division between courts of law and courts of equity, the Enelow-Ettelson doctrine provided that an order staying legal proceedings (such as a suit for damages for a contract breach) in district court so as to rule upon an equitable defense (such as fraud in the formation of the contract) is analogous to an equity chancellor enjoining the proceedings before a law judge; thus orders refusing to stay the legal proceeding in favor of an equitable defense is analogous to an equity court's refusal to grant an injunction: which provides the grounds for appeal under § 1292(a)(1). Enelow v. New York Life Ins. Co., 293 U.S. 379, 55 S.Ct. 310, 79 L.Ed. 440 (1935); Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188, 63 S.Ct. 163, 87 L.Ed. 176 (1942). Some courts reasoned that a district court's refusal to stay litigation in favor of arbitration is equivalent to a court of equity refusing to enjoin a legal proceeding; the refusal of the injunction thus provides a basis for appellate jurisdiction. See e.g. B & R Assoc. v. Dependable Ins. Co., 835 F.2d 526, 528 (4th Cir.1987) (citing cases). However, our court refused to extend the doctrine to include orders refusing to compel arbitration. Ohio-Sealy Mattress Mfg. Co. v. Duncan, 714 F.2d 740, 743 (7th Cir.1983), cert. denied, 464 U.S. 1044, 104 S.Ct. 712, 79 L.Ed.2d 176 (1984). The conflict over the application of the

doctrine was rendered moot by Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988), which abolished the Enelow-Ettelson doctrine.

[3] Apart from the Enelow-Ettelson doctrine, appellate review of interlocutory orders may be obtained under § 1292(a)(1) if the order has both the effect of an injunction and has "serious, perhaps irreparable, consequences." Carson v. American Brands, Inc., 450 U.S. 79, 83-84, 101 S.Ct. 993, 996-97, 67 L.Ed.2d 59 (1981) ("Unless a litigant can show that an interlocutory order of the district court might have a 'serious, perhaps irreparable, consequence,' and that the order can be effectively challenged only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.").

However, this court has refused to extend this theory to orders refusing to stay or dismiss district court proceedings in favor of arbitration. Ohio- Sealy, 714 F.2d at 743 ("The effect of the order in this case [refusing to stay district court proceedings in favor of arbitration] was merely to determine in which forum the claims would be heard. Thus, because [the appellant] has failed to establish that the denial is likely to have 'serious, perhaps irreparable' consequences as required in Carson v. American Brands, Inc., 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1980), this order is non-appealable at this stage of the litigation."); Matterhorn, Inc. v. NCR Corp., 727 F.2d 629, 631 (7th Cir.1984) ("the denial of a motion to compel arbitration pending a trial on the existence of an arbitration agreement does not have serious or irreparable consequences."); Matterhorn, Inc. v. NCR Corp., 763 F.2d 866, 870 (7th Cir.1985) ("Despite its resemblance to a mandatory injunction, an order to arbitrate is assimilated rather to a procedural order, such as a discovery order. Hence making

or refusing to make such an order is not appealable under § 1292(a)(1).").

The appellant, Central Cartage, argues that Gulfstream altered the face of appellate jurisdiction and requires us to ignore our prior decisions and evaluate, on a clean slate, our jurisdiction to review interlocutory orders denying motions to compel arbitration. In support, the appellant urges us to follow two recent cases from the Fourth and Eighth Circuits holding that such orders have the practical effect of refusing to grant an injunction. Kansas Gas & Elec. Co. v. Westinghouse Elec. Corp., 861 F.2d 420, 422 (4th Cir.1988) (holding that orders denying arbitration have an injunctive effect and serious consequences because they force parties to undergo the expense of trial before being able to appeal); Nordin v. Nutri/System, Inc., 897 F.2d 339 (8th Cir.1990) (same). See also Abernathy v. Southern California Edison, 885 F.2d 525, 527 n. 9 (9th Cir.1989) (holding that orders granting arbitration are not appealable, but observing that orders denying arbitration may come within the exception noted by Gulfstream and applied by the Fourth Circuit in Kansas Gas & Elec. Co.).

However, although Gulfstream overruled the Enelow-Ettelson doctrine, it specifically preserved the alternate route under 1292(a)(1), identified in our caselaw of Ohio-Sealy, Matterhorn et al. See Gulfstream, 485 U.S. at 287-88, 108 S.Ct. at 1142-43 ("Section 1292(a)(1) will, of course, continue to provide appellate jurisdiction over orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunctions and have 'serious, perhaps irreparable, consequences.' ") (quoting Carson, 450 U.S. at 84, 101 S.Ct. at 996-97). Indeed, our court has recently noted and re-affirmed the analysis underlying Ohio-Sealy, refusing to treat the denial of a stay in favor of arbitration as an injunction:

> Searching for an injunction in orders controlling the progress of litigation has an artificial quality. Every decision to proceed or wait imposes costs, but none resolves the merits. If potential costs of procedural decisions make for appellate jurisdiction then many interlocutory orders are appealable--a step the Supreme Court has told us to resist. See Digital Equipment Corp. v. Desktop Direct, Inc., --- U.S. ----, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994). Cf. In re Springfield, 818 F.2d 565 (7th Cir.1987) (order that imposes costs but does not affect ultimate disposition of the merits is not appealable as an "injunction"). It is, after all, established that the costs of litigation are not "irreparable injury." If a district court errs in conducting a lawsuit when a contract calls for arbitration, that mistake may be corrected on appeal from a final decision;....

Briggs & Stratton Corp. v. Local 232, 36 F.3d 712, 714 (7th Cir.1994) (internal citations omitted), cert. denied, --- U.S. ----, 115 S.Ct. 1998, 131 L.Ed.2d 1000 (1995).

Accordingly, we decline to follow the Fourth and Eighth Circuits and reaffirm our holding in Ohio-Sealy et al. As noted in Briggs & Stratton, litigation costs are not irreparable harm and appellants have failed to show that the district court's order has the practical effect of refusing to grant an injunction.[1]

---

[1]Further, Central Cartage's own actions in delaying nearly a full year before filing its motion to compel arbitration tends to demonstrate that prompt arbitration was not of vital interest to Central Cartage. See South Bend

Appendix C

B. The Federal Arbitration Act

Central Cartage asserts, in the alternative, that the Federal Arbitration Act provides appellate jurisdiction to review the district court's denial of a motion to compel arbitration.[2]

In the wake of Gulfstream, in 1989, Congress amended the Arbitration Act, specifying which interlocutory orders concerning arbitration are appealable and which are not. Specifically, 9 U.S.C. s 16(a) provides in part:

> An appeal may be taken from--
>
> (1) an order--
>
> (A) refusing a stay of any action under section 3 of this title[3],

---

Consumers Club, Inc. v. United Consumers Club, Inc., 742 F.2d 392, 394 (7th Cir.1984) ("[Appellant's] failure to promptly and actively seek injunctive relief 'is a good indication that the status quo can continue until the ultimate conclusion of the litigation without interlocutory appellate review.' ") (quoting Shirey v. Bensalem Township, 663 F.2d 472, 476 (3d Cir.1981)).

[2] The district court specifically refused to compel "alternative dispute resolution." We will assume for purposes of the following analysis that the contractual dispute mechanism specified in the collective bargaining agreement (referring disputes to a "Joint Area Committee" for final resolution) is "arbitration" within the meaning of the Arbitration Act.

[3] Section 3 of the Arbitration Act provides that if a dispute is "referable to arbitration under an agreement in writing" the court must "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

> (B) denying a petition under section 4 of this title to order arbitration to proceed[4].

Thus, under § 16(a)(1)(A) and (B), appellants argue, we may review the district court's denial of its motion to compel arbitration.

This argument is correct, with one major flaw: section 1 of the Arbitration Act specifically excludes coverage--including the jurisdiction rules of § 16--for "contracts of employment of seamen, railroad employees, or any other class of employees engaged in foreign or interstate commerce."

Although several circuits have interpreted the language of § 1 to preclude the application of the Arbitration Act to all collective bargaining agreements, see e.g. Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Pennsylvania Greyhound Lines, Inc., 192 F.2d 310 (3d Cir.1951); United Elec., Radio & Mach. Workers v. Miller Metal Prod., Inc., 215 F.2d 221 (4th Cir.1954), our circuit has limited § 1 to the transportation industries. Briggs & Stratton, 36 F.3d at 714-15 (citing Pietro Scalzitti Co. v. Operating Engineers, 351 F.2d 576, 579-80 (7th Cir.1965)). See also Matthews v. Rollins Hudig Hall Co., 72 F.3d 50, 53 n. 3 (7th Cir.1995) ("The Seventh Circuit, however, has held that this [sec. 1] exclusion is limited to transportation workers, or in other words, workers actually engaged in the movement of goods in interstate commerce...."); Miller Brewing Co. v. Brewery Workers Local

---

[4] Section 4 of the Act states that a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" may petition a district court "for an order directing that such arbitration proceed in the manner provided for in such agreement."

Union No. 9, 739 F.2d 1159, 1162 (7th Cir.1984). Thus, for disputes involving collective bargaining agreements covering transportation workers, the Arbitration Act does not provide jurisdiction for interlocutory appeals from a district court's denial of a motion to compel arbitration. Briggs & Stratton, 36 F.3d at 714-15[5].

The appellant, Central Cartage, is primarily engaged in local trucking and occasionally transports cartage across state lines. We hold that the workers of Central Cartage (covered in the collective bargaining agreement at issue between Central Cartage and the Pension Fund) therefore qualify as "transportation" workers. Because the Arbitration Act does not apply to "transportation" workers, see § 1, Central Cartage's NMFA (the collective bargaining agreement) for its workers is not covered by the Act. Thus the jurisdictional provisions of § 16 of the Act are not applicable to Central Cartage's appeal.

III. Conclusion

The appeal is dismissed for lack of appellate jurisdiction.

---

[5] The Pension Fund has asked us to overturn Pietro Scalzitti and to hold that § 1 of the Arbitration Act excludes coverage for all collective bargaining agreements and not just those involving transportation workers. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n. 2, 111 S.Ct. 1647, 1651 n. 2, 114 L.Ed.2d 26 (1991), noted the issue but declined to resolve it. The question of overruling Pietro Scalzitti and its progeny was presented to this court in Matthews, 72 F.3d at 53 n. 3, but we saw "no reason to overturn these well-established precedents." Id. Following Matthews, we similarly decline to apply the s 1 exclusion to all collective bargaining agreements.

APPENDIX D

Order of the United States Court of Appeals for the Seventh Circuit granting Motion For Stay Of Mandate Pending Petition For Writ Of Certiorari, dated June 19, 1996

Appendix D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

June 19, 1996

Before

Hon. JOHN L. COFFEY, Circuit Judge

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND and HOWARD MCDOUGALL, Trustee, Plaintiffs-Appellees,	]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 95-2406 v.	]	No. 94 C 774
CENTRAL CARTAGE COMPANY, a Michigan corporation, Defendant-Appellant.	]	Elaine E. Bucklo, Judge.

The following are before the Court:

1. **MOTION FOR STAY OF MANDATE PENDING PETITION FOR WRIT OF**

CERTIORARI, filed on June 12, 1996, by counsel for the appellant.

2. **RESPONSE OF PLAINTIFFS-APPELLEES TO MOTION FOR STAY OF MANDATE PENDING PETITION FOR WRIT OF CERTIORARI**, filed on June 17, 1996, by counsel.

IT IS ORDERED that #1 is **GRANTED** and the mandate is **STAYED**. If the Supreme Court denies Central Cartage's Petition for a Writ of Certiorari, the mandate shall issue forthwith.

APPENDIX E

28 U.S.C. § 1292(a)(1)

(a) the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

Supreme Court, U. S.
FILED
AUG 16 1996
CLERK

No. 96-111

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CENTRAL CARTAGE CO.,
Petitioner,
v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and HOWARD MCDOUGALL, Trustee, and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND and HOWARD MCDOUGALL, Trustee,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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30 pp

QUESTION PRESENTED

Whether the court of appeals correctly determined that it lacked jurisdiction under 28 U.S.C. § 1292(a)(1) to review an interlocutory order that denied a motion to compel exhaustion of contractual alternate dispute resolution procedures.

STATEMENT OF CORPORATE AFFILIATION

Pursuant to Rule 29.6, Respondents state that none of Respondents are corporations.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-111

CENTRAL CARTAGE CO.,

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and HOWARD MCDOUGALL, Trustee, and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND and HOWARD MCDOUGALL, Trustee,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case was brought under § 515 of ERISA (29 U.S.C. § 1145) by the Central States, Southeast and Southwest Areas Pension Fund and the Central States, Southeast and Southwest Areas Health and Welfare Fund (hereinafter collectively referred to as "Central States") to collect fringe benefit contributions owed by Central Cartage Co. ("Cartage") for 1992 and 1993 on behalf of casual (i.e. "short term") employees and regular employees in accordance with a collective bargaining agreement and the

Central States' trust agreements. The case was filed a short time after the conclusion of district court litigation between the same parties concerning Cartage's liability for contributions owed from 1987 to 1991. In the course of awarding summary judgment to Central States in the prior litigation, the court rejected Cartage's contention that it was not required to contribute on casual employees who had not joined the union or on regular employees for days compensated but not worked (e.g. paid holidays). *Central States Pension Fund v. Central Cartage Co.*, 861 F. Supp. 1402, 1411 (N.D. Ill. 1994), *aff'd.*, 69 F.3d 1312 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 1419 (1996) (hereinafter "*Cartage I*".) The final judgment required Cartage to pay contributions of $1.7 million on casual employees and $200,000 on regular employees. 861 F. Supp. at 1411. Before entry of the summary judgment in *Cartage I*, the union (not Central States) attempted to invoke the same alternative dispute resolution procedures of the collective bargaining agreement (hereinafter referred to as "ADR") relied upon by Cartage in this case to resolve the casual employee issue. However, Cartage objected contending that the dispute should be resolved in federal court in *Cartage I* and after a nearly 2-year delay, the union's grievance was formally declared to be deadlocked (Res. App. 1a-7a).

This case was filed to collect $870,000 in contributions on casual employees and $267,000.00 on regular employees which an audit revealed to be owed for the period immediately after that covered by *Cartage I*. At the time Cartage was served, its request that the district court in *Cartage I* reconsider its summary judgment award with respect to the casual employee issue was pending and the court had not yet ruled on the regular employee issue. Six months later, the district court in *Cartage I* rejected the request for reconsideration and also ruled against Cartage on the regular employee issue. Cartage then realized that issue preclusion principles would foreclose its argument that the contributions sought by Central

States in this case were not due and it could prevail only if it could steer the case to a forum that was not bound by the doctrine. As a result, Cartage filed its motion to compel ADR contending that Central States' claim was subject to same ADR procedures that it had previously resisted.

The district court indicated that the case was "governed by the Seventh Circuit's decision in *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc*," 50 F.3d 388 (7th Cir. 1995), which established that to avoid a waiver of ADR, a party was "obligated [to] promptly . . . seek a stay or dismissal." (Pet. App. 3a). Since Cartage waited nearly a year before filing its motion during which it "participated in this lawsuit, conducted discovery and filed two written status reports", the district court concluded that ADR had been waived and that it was not necessary to address the other five reasons identified by Central States for denying Cartage's motion (Pet. App. 3a).

The court of appeals dismissed Cartage's appeal for lack of jurisdiction. The court of appeals recognized that the decision in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287-8 (1988) indicated that 28 U.S.C. § 1292(a)(1) authorized appellate jurisdiction over not just orders that granted or denied injunctions but also orders that had the practical effect of granting or denying injunctions as long as the order also had "serious, perhaps irreparable, consequence." (Pet. App. 13a). There was no claim that the district court order was an injunction so the court of appeals had to determine whether the order had the practical effect of denial of an injunction and had serious or irreparable consequences. The court of appeals concluded that the first requirement was not satisfied because the order was merely procedural and did not have the practical effect of the denial of an injunction (Pet. App. 13a-15a) The second requirement was not satisfied because prior seventh circuit authority indicated an erroneous refusal to order a stay pending

arbitration did not cause irreparable harm since it only imposed additional litigation costs which never constituted irreparable injury and in any event, the mistake could be corrected by an appeal from a final decision. (Pet. App. 15a). Further, the court noted that irreparable harm could not result in this particular case because "Cartage's own actions in delaying nearly a full year before filing its motion to compel arbitration tends to demonstrate that prompt arbitration was not of vital interest to Central Cartage." (Pet. App. 15a n.1).

REASONS FOR DENYING THE WRIT

The writ should be denied for four reasons. First, this court has repeatedly indicated that review of interlocutory decisions is rare and Cartage has not identified any exceptional circumstances that warrant immediate review in this case. Second, the cases relied upon by Cartage in support of its claim that a conflict among the circuits exists are distinguishable because: a) they involved parties that (unlike Cartage) timely requested arbitration and thus were able to convince an appellate court that they would be irreparably harmed if an immediate appeal was not allowed because the benefits of speed and economy derived from arbitration would be lost forever if their appeal was not heard until entry of final judgment and b) they did not involve an ADR procedure that had already deadlocked over the dispute between the parties, and c) they did not involve labor law ADR which cannot resolve statutory claims such as Central States' claim in this case. Third, certiorari should be denied because the issue of appellate jurisdiction over orders which deny a stay in favor of arbitration was addressed by Congress with the 1988 amendments to the Federal Arbitration Act ("FAA") and the cases relied upon by Cartage in support of the claimed conflict between the circuits did not consider the impact of the amendment. As a result of the amendment, the issue in this case is not sufficiently important to warrant review because it will arise only in

very rare circumstances where the FAA is inapplicable. Fourth, even if the seventh circuit was wrong on the jurisdictional issue, it is exceedingly unlikely that Cartage will prevail on the merits since the district court's waiver determination will be reviewed under an abuse of discretion standard and the court of appeals has already indicated that Cartage's delay was unreasonable. Since Cartage will lose on the merits in any event, the writ should be denied.

I. THE PETITION SHOULD BE DENIED BECAUSE THE UNDERLYING ORDER IS INTERLOCUTORY.

Ordinarily, "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384 (1893). Certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision . . . And, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Thus, the lack of finality in the judgment below may "of itself alone" furnish "sufficient ground for the denial of the application." *Id., see also, Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) (certiorari denied "because Court of Appeal's remand made case not yet ripe for review by this Court"); *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (J. Scalia concurring in denial of writ of certiorari because "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Judge Stevens' dissenting, referring to "the Court's normal practice of denying interlocutory review.") Piecemeal appellate review is disfavored in order to conserve scarce

judicial resources and avoid delay and cost to the parties. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 n.7 (1988). Further, a party that is dissatisfied with an interlocutory order may prevail on the merits ultimately making review by this Court unnecessary.

Certainly, nothing in the petition suggests that this case is extraordinarily important to anyone other than the litigants. In fact, as noted below (part III, *infra*), the issue is not at all important since the 1988 amendment of the FAA explicitly authorizes appellate review of a court order denying arbitration so this situation will arise, if at all, only in the very rare case that is not covered by the FAA. 9 U.S.C. § 16.

Since the decision below is interlocutory and involves a situation that rarely occurs, the petition for writ of certiorari should be denied.

II. THE CASES RELIED UPON BY CARTAGE ARE DISTINGUISHABLE.

Cartage claims that its petition should be granted because the court of appeals decision conflicts with the decisions of other circuits. However, even if the purported conflict existed, the cases relied upon by Cartage are distinguishable for three reasons.

First, Cartage could not satisfy the irreparable harm factor required by the cases it cites because its nearly one year delay in seeking ADR led the court of appeals to believe that ADR "was not of vital importance to Central Cartage." (Pet. App. 15a n.1). In each case cited by Cartage, the courts recognized that an order that had the practical effect of the denial of an injunction was appealable under *Gulfstream Aerospace Corp.* only if the denial also resulted in serious, perhaps irreparable consequences. Each court believed the denial of arbitration has such effect because the benefits of arbitration—speed and econ-

omy—would be lost if the movant was forced to trial before being able to appeal. Cartage's one year delay in seeking ADR is fatal to appellate jurisdiction because it demonstrates that these benefits of ADR are irrelevant to Cartage. Cartage further demonstrated its aversion to ADR when it objected to the union's efforts to invoke ADR and contended that the dispute over casual employee contributions had to be resolved in the federal forum selected by Central States (Res. App. 2a-4a). The only difference now is that issue preclusion principals dictate that Cartage will lose in this forum because of the decision in *Cartage I*. Certainly, the desire to avoid the preclusive effect of a federal court judgment is not the type of serious or irreparable consequence contemplated by the cases relied upon by Cartage. Since Cartage has demonstrated that it does not place the value on ADR that was so critical in the cases it cites, the cases are readily distinguishable.

Second, the cases relied upon by Cartage are also distinguishable because the grievance panel that would hear the dispute has already deadlocked on the casual employee issue after a nearly 2-year delay (Res. App. 5a-7a). Since the deadlocked grievance panel was the final stage in the ADR procedure (Res. App. 13a), ADR is incapable of resolving this dispute so the purported benefits of speed and economy relied upon in the cases cited by Cartage do not exist here.[1]

Finally, the cases cited by Cartage are distinguishable because this case involves ADR under a collective bargaining agreement which, unlike arbitration under the FAA, cannot vindicate statutory rights. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 774-5 (1981); *McDonald v. City of West Branch*, 466 U.S.

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[1] Cartage argued below that the grievance panel deadlocked on an issue of which forum was proper, not on the merits. Even if this were so, there is no reason to believe the panel will not again deadlock on the forum issue.

284 (1984); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Gilmer v. Interstate/Johnson Lane Co.*, 500 U.S. 20 (1991). Cartage's main argument on the merits is that although the collective bargaining agreements explicitly require contributions on all casual employees, the parties really only agreed that contributions would be paid on casuals who were union members. *Cartage I*, 69 F.3d at 1313-14. While § 515 of ERISA forecloses this oral understanding defense in the federal forum, *Cartage I*, 69 F.3d at 1315, the defense would be available to Cartage at ADR because the grievance panel cannot enforce Central States' ERISA rights. In contrast, the cases relied upon by Cartage all involve arbitration under the FAA so statutory rights could be vindicated.

Further, the ADR procedure under the collective bargaining agreement is not "arbitration" as Cartage claims because disputes are submitted to grievance panels consisting solely of union and employer representatives and usually will not reach an independent arbitrator. Requiring a multiemployer fund to exhaust such a procedure is inconsistent with ERISA. *Central States Pension Fund v. Tank Transport, Inc.*, 779 F. Supp. 947, 951 (N.D. Ill. 1991) Since ADR is *per se* inadequate in this case, the district court's refusal to order ADR could not have the serious or irreparable consequences required by the cases cited by Cartage

III. CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUE PRESENTED RARELY ARISES.

Certiorari should be granted only if the conflict between the circuits claimed by Cartage relates to an "important matter." SUP. CT. R.10. However, the purported conflict claimed by Cartage is not important because "Congress eliminated the significance of this issue [of appellate jurisdiction] for most purposes by adding a new section to the Federal Arbitration Act." *Briggs & Stratton v. Local 232 International Union*, 36 F.3d 712, 714 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1998 (1995). In its

petition, Cartage does not challenge the court of appeals' determination that its collective bargaining agreement is not covered by the FAA so Cartage must rely exclusively upon 28 U.S.C. § 1292(a)(1). But ADR clauses not covered by the FAA are rare so the alleged conflict between the circuits is of limited application and no important issue justifying certiorari is presented.

Eight months after *Gulfstream Aerospace Corp.*, Congress amended the Federal Arbitration Act ("FAA") by adding § 16 which explicitly authorizes immediate review of orders which deny arbitration so in the vast majority of cases where a district court refuses to require arbitration, there is a clear right to appellate review. 9 U.S.C. § 16. Not surprisingly, there have been virtually no cases dealing with whether there is appellate jurisdiction to review the denial of arbitration under 28 U.S.C. § 1292(a)(1) since 1989. One leading commentator has explained the reason for this situation as follows:

> *Gulfstream* came down on March 22, 1988. In just a few months, with the adoption of § 15 of Title 9 as part of the Judicial Improvements Act on November 29, 1988, Congress was to make *Gulfstream*, and the case law that it overruled, largely academic on the arbitration scene. With § 15 and its more explicit directions, Congress superseded § 1292 (a)(1) of Title 28 in respect of the arbitration injunctions, abandoning altogether the law/equity distinction and substituting a pro-arbitration/anti-arbitration distinction in its place. . . In this locale, § 15 has the full-time job and § 1292(a)(1) is now unemployed.

David D. Siegel, *Appeals from Arbitrability Determinations Under the New § 15 of the U.S. Arbitration Act*, 126 F.R.D. 589, 597 (1989).[2]

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[2] Professor Siegel refers to § 15 of Title 9 in his article. In 1990, § 15 was renumbered as § 16, Pub. L. 101-650, Title III § 325(a)(1) Dec. 1, 1990.

Each of the fourth circuit decisions relied upon by Cartage were decided or submitted before the November 19, 1988 FAA amendment. *Peoples Security Life Ins. v. Monumental Life Ins.*, 867 F.2d 809 (4th Cir. 1989) (submitted October 4, 1988); *J.J. Ryan & Sons v. Rhone Poulenc Textile S.A.*, 863 F.2d 315 (4th Cir. 1988) (submitted June 2, 1988); *Kansas Gas & Electric Co. v. Westinghouse Elec. Co.*, 861 F.2d 420 (4th Cir. 1988) (submitted October 5, 1988). A short time later, the fourth circuit recognized that the FAA amendment "dispelled doubts about our jurisdiction", *Jeske v. Brooks*, 875 F.2d 71, 73 (4th Cir. 1989), and it has never again relied upon 28 U.S.C. § 1292(a)(1) for appellate jurisdiction.

Concededly, the Eighth Circuit decided *Nordin v. Nutri/System, Inc.*, 897 F.2d 339 (8th Cir. 1990) after the FAA amendment. Apparently, the appellant failed to argue that appellate jurisdiction was automatic under the FAA, which unquestionably governed the case since the FAA was mentioned in the discussion on the merits. 897 F.2d at 343-44. Eventually the Eighth Circuit recognized that jurisdiction existed under the FAA in *Case Int'l Co. v. T.L. James and Co.*, 907 F.2d 65, 66 n.1 (8th Cir. 1990) and each of the subsequent eighth circuit decisions have relied upon the FAA as the basis for jurisdiction over orders that reject arbitration without ever mentioning § 1292(a)(1). *In re: Piper Funds, Inc., Institutional Government Income Portfolio Litigation*, 71 F.3d 298, 300 (8th Cir. 1995); *Daisy Mfg. Co. v. NCR Corp.*, 29 F.3d 389, 392 (8th Cir. 1994); *Houlihan v. Offerman & Co.*, 31 F.3d 692, 694 (8th Cir. 1994).[6]

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[6] Respondent is aware of only one case decided after the FAA amendment that discussed jurisdiction under 28 U.S.C. § 1292(a)(1) which was not cited by petitioner. *Briggs & Stratton Corp. v. Local 232 Industrial Union of Allied Industrial Workers*, 36 F.3d 712 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1998 (1995). The *Briggs & Stratton* court eventually decided appellate jurisdiction did lie under the FAA.

Since Cartage concedes that the discussion in *Abernathy v. Southern California Edison*, 885 F.2d 525 (9th Cir. 1989) is *dicta* at best (actually the court explicitly indicated it was not "offer[ing] an opinion on the issue"), the decision does not support Cartage's claim that a conflict exists. Further, *Zosky v. Boyer*, 856 F.2d 554 (3rd Cir. 1988) is inopposite because it involved an appeal from an order that stayed a proceeding in favor of arbitration. Moreover, subsequent to these decisions the third and ninth circuits have determined that appellate jurisdiction over orders refusing to stay a case in favor of arbitration are appealable under the FAA so the issue is not important in either circuit. *Saari v. Smith Barney & Co.*, 968 F.2d 877, 879 (9th Cir. 1992); *Hays & Co. v. Merrill, Lynch, Inc.*, 885 F.2d 1149, 1151-52 (3rd Cir. 1989).

Since the issue identified by Cartage is of limited application, the petition should be denied.

IV. RESOLUTION OF THE QUESTION PRESENTED WILL NOT AFFECT THE ULTIMATE DEPOSITION OF THIS CASE.

Even if this Court were to grant the writ, it would not affect the ultimate outcome of the case. It is well established that:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeal is judicial, not simply administrative or managerial. Resolution here of the * * * [issue in conflict among the circuits] can await a day when the issue is posed less abstractly.

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959). The district court ruled that Cartage had waived ADR because the alleged right was belatedly asserted. Cartage concedes that this determination must be reviewed under the deferential abuse of discretion

standard. It is exceedingly unlikely that Cartage could prevail under this standard of review, especially since the Seventh Circuit has already stated that Cartage's delay "tends to demonstrate that prompt arbitration was not of vital interest to Central Cartage." (Pet. App. 15a n.1). Since Cartage's ADR defense will be rejected on the merits, the petition should be denied.

CONCLUSION

For the foregoing reasons, respondents submit that the petition for writ of certiorari be denied.

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APPENDIX

JUNE 9, 1992

The Committee members were as follows:

Employer Committee	*Union Committee*
Ralph Stewart, Chairman	Jack Yager, Chairman
Stephen Bridge	Frank Wsol, Co-Chairman
Bob Preut	Carlow Scalf
Bill Carpenter	Lawrence Parrott
Wayne Thompson	Jerry Shaw
Joe Secich	Paul Tuggle
Robert Terbin	

Sergeant-at-arms: Jim Schenk

Secretary: Teddy Pocius

INDEX OF DEADLOCKED CASES

Case	Article	Parties	Pages
216		Local 407, Cleveland vs. Central Cartage	25-46
245	55	Local 627, Peoria vs. Central Cartage	72-73
247-259		Local 89, Louisville vs. Central Cartage	1-8
269	32	Local 957, Dayton vs. Central Cartage	14-19

[1] CO-CHAIRMAN WSOL: 247 through 259 will be heard as one?

MR. SCHENK: Yes.

CO-CHAIRMAN WSOL: Do you want to bring them in?

CHAIRMAN STEWART: Let's finish the Agenda.

MR. BRIDGE: That's all together down to 259.

CHAIRMAN STEWART: We are going to hear 247—

MR. SCHENK: —through 259.

CO-CHAIRMAN WSOL: Heard as one. If you want to finish the Agenda, we can do that. I figured we would stop and listen to this case and then go on with the Agenda.

CHAIRMAN STEWART: We can do that, Frank. I'm agreeable. We'll take a rest.

MR. THOMPSON: So we are going to hear the cases?

CO-CHAIRMAN WSOL: 247 through 259.

MR. BRIDGE: What's your pilot case, Tom? We are calling you in here on 247 through 259 inclusive.

CO-CHAIRMAN WSOL: What do you want to use, [2] Jerry?

MR. SHAW: 247: *Case No. 247 is as follows: Local 89, Louisville vs. Central Cartage* Deadlocked at Ky/WVa JSC, April 28, 1992.

CO-CHAIRMAN WSOL: Let's have your attention, please. This is Cases 247 through 259. They will be heard as one. Case 247 is being used as the pilot case.

It's Local 89 vs. Central Cartage. "Stanley Sharp—The year of 1990, Central Cartage failed to pay daily pension requirements to the CSPF on behalf of Stanley Sharp, casual, worked this year."

Union?

MR. CHRIST: Point of order, Mr. Chairman. Thomas Christ for the Company. I'd like to take a point of order that this grievance revolves around an issue that is in federal court between the Central States Pension Fund

and Central Cartage and, therefore, improper before this Committee at this time.

MR. SHAW: Mr. Chairman, Shaw for the Union. The contract is pretty plain. The Employer [3] is to pay casuals pensions per days worked, and this has failed to happen going back several years. It first came to me the early part of this year when we had two casuals checking their time as they was getting ready to retire. And that's where we are now. My friend over there, Tom, allowed me to read part of the transcript of an old trial or hearing, and the Union doesn't agree that these are "nonunion casuals." They were all union casuals. They were all covered under the contract. And, therefore, it's our position that it is proper and it should be paid.

MR. CHRIST: If I may, Mr. Chairman. There is on ongoing audit and lawsuit from the Central States. I have here a copy of both the suit filed by the Central States, our response to that suit. And one of the issues directly in the suit is the issue of casuals.

I'd also like to introduce testimony out of a deposition from Joel Aherns at Central States. This deposition was taken on the 7th of April, 1992 by Notary Public Laura Benar for Cook County, taken on the 7th of April, and I'd like to just read two questions and Mr. Aherns' answers to those [4] questions.

CO-CHAIRMAN WSOL: What page would you be reading from?

MR. CHRIST: Page 28, line 21:

> "Q It is your understanding that if a question of job classification has been determined by the grievance machinery that the Pension Fund and Health & Welfare Fund is bound to follow that decision?
>
> A No, that's not my understanding.
>
> Q What is your understanding?
>
> A That we do not consider ourselves bound by the grievance machinery one way or the other. We use the federal courts to make most of the determinations that we feel are necessary under a given agreement if there is an area of dispute."

I will go to a position in our countersuit against Central States on page 3 of Central's pleadings. It was Central's belief following the 1988 audit and the settlement agreement, which settled all audit questions, that Central did not have an obligation to contribute to the Pension Fund for its nonunion member casual workers. This issue [5] exactly is before the federal courts based on the settlement of the lawsuit that settled the '88 audit. You have the fund that's claiming they do not care and do not abide by grievance decisions. Therefore, this grievance is improper at this time.

CO-CHAIRMAN WSOL: Union?

MR. SHAW: If I say, Mr. Chairman, in the Company's own presentation, they again read the portion of "nonunion." These are not nonunion casuals.

Secondly, this Local Union don't really give a damn what Central States feels they are bound to or not bound to. We are here representing our employee member, casuals, and we are here to get justice from this Committee on behalf of those employees, whatever justice this Committee deems is needed and necessary. We are not here to argue for or with Central States. This is a contract violation. I will rest.

CO-CHAIRMAN WSOL: Company?

MR. CHRIST: I have nothing further other than I have presented on the issue of propriety.

CO-CHAIRMAN WSOL: Any questions from this Committee?

[6] MR. BRIDGE: Not yet.

CO-CHAIRMAN WSOL: Not yet?

MR. BRIDGE: Not right now. The last paragraph of Article 55, is the Local Union filing this under Article 55?

MR. SHAW: Yes.

MR. BRIDGE: Cartage agreement.

MR. SHAW: Yes.

MR. BRIDGE: That's the last question I had. The current cartage agreement, is that correct?

MR. SHAW: Current and past.

MR. BRIDGE: Do they encompass both contracts?

MR. SHAW: '91/'94 and some of them do go back to '88/'91.

MR. BRIDGE: Thank you.

MR. THOMPSON: I guess I have a question. I seem to be somewhat confused. The Company says that these casuals are nonunion casuals, and the Union is saying that they're union casuals.

Is this a right-to-work state, or how can we go about verifying that these people are covered under your benefit program?

[7] MR. SHAW: Well, if you are asking me, Wayne, I'm not being a smart aleck but you can ask me if they're union members and I can tell you they are union members. And it is not a right-to-work state. Again, the contract prevails period.

Now, if you want to know the honest to God truth, if they were nonunion, I would still take the same position on those employees, casuals, as long as the Employer is signatory to the contract.

CO-CHAIRMAN WSOL: Anything else?

MR. SHAW: That's all I have, Mr. Chairman.

CO-CHAIRMAN WSOL: The parties are excused.

(The parties left the room, whereupon hte Committee went into executive session, and a motion was made and properly seconded that it's improper under the language in the contract.)

CO-CHAIRMAN WSOL: There's a motion that it's improper. All those in favor say "aye."

(The Employer Committee voted "aye.")

CO-CHAIRMAN WSOL: Opposed?

(The Union Committee voted "no.")

CO-CHAIRMAN: Deadlocked on impropriety. Bring them in, Jim.

[8] (The parties re-entered the room.)

CO-CHAIRMAN WSOL: Give them the decision, please.

(Decision read.)

NATIONAL GRIEVANCE COMMITTEE

Union Chiarman:
Ron Carey
25 Louisiana Ave., N.W.
Washington, D.C. 20001

Employer Chairman:
Stephen F.G. Bridge
107 W. Willow Ave.
Whesion, IL 60187

March 18, 1994

Mr. Lon E. Fields, Sr., President
Teamsters Local Union No. 89
3813 Taylor Blvd.
Louisville, Kentucky 40215

Mr. Thomas Christ
Central Cartage Company
P. O. Box 80
Warren, Michigan 48090

Mr. Charles L. Gauwitz, President
Teamsters Local Union No. 627
7101 North Allen Road
Peoria, IL 61614

N-8-92-MCLAC-C7 *Local 89 (Louisville) and Local 627 (Peoria) vs Central Cartage.* Case 247, Deadlocked at the 6/92 MCLAC-CSJAC

Gentlemen:

Please be advised that at the National Grievance Committee, on March 1, 1994, a motion based on the transcript was made that the claim of the Union be upheld. MOTION DEADLOCKED.

Very truly yours,

/s/ Ron Carey
RON CAREY
Union Chairman

/s/ Stephen F. G. Bridge
STEPHEN F. G. BRIDGE
Employer Chairman

cc: CCT
Harold Yates
Frank Wool
Jim Cox

ARTICLE 45.
GRIEVANCE MACHINERY
AND UNION LIABILITY

Section 1. General

The Unions and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of settlement, as provided for in this Agreement, and in the Master Agreement, if applicable, of any controversy which might arise.

Disputes shall first be taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedure shall apply.

(a) Where a Joint Local Area Committee, by a majority vote, settles a dispute, no appeal may be taken to the Joint State Cartage Committee. Such decisions will be final and binding on both parties.

(b) Where a Joint Local Area Committee is unable to agree or come to a decision on a case, or where there is no such committee, it shall, at the request of the Union or the Employer involved, be appealed to the Joint State Cartage Committee at the next regularly constituted session. Minutes of the local committee shall set forth the position and facts relied on by each party, but each party may supplement such minutes at the hearing before the Joint State Cartage Committee.

(c) Where a Joint State Cartage Committee, by a majority vote, settles a dispute, no appeal may be taken to the Joint Area Cartage Committee. Such decision will be final and binding on both parties.

(d) Where a Joint State Cartage Committee is unable to agree or come to a decision on a case, it shall, at the request of the Union or the Employer involved, be appealed to the Joint Area Cartage Committee at the next regularly constituted session, unless the parties mutually

agree to umpire handling. Matters pertaining to interpretation are not subjct to umpire handling at this level. Where the Joint Area Committee, by majority vote, settles a dispute, such decision shall be final and binding on both parties with no further appeal.

(e) It is agreed that all matters pertaining to the interpretation of any provisions of this Agreement may be referred by the State Secretary for the Union or the State Secretary for the Employers at the request of either the Employer or the Union parties to the issue with notice to the other Secretary, to the Joint Area Cartage Committee at any time for final decision. At the request of the Company or Union representative, the Joint Area Cartage Committee shall be convened on seventy-two (72) hours' notice to handle matters so referred.

(f) Deadlocked cases may be submitted to umpire handling if a majority of the Joint Area Committee determine to submit such matter to an umpire for decision. Deadlocked grievances and questions of interpretation which are subject to handling under the provisions of Article 8 of the Master Agreement shall be referred promptly to the National Grievance Committee in accordance with such Article 8.

(g) Failure of any Joint Committee to meet without fault of the complaining side, refusal of either party to submit to or appear at the grievance procedure at any stage, or failure to comply with any final decision, withdraws the benefits of Article 45.

(h) The procedures set forth herein may be invoked only by the authorized Union representative or the Employer.

(i) Any claim by an employee covered by this Agreement for additional compensation or benefits must be presented in writing within thirty (30) days from the end of the month in which the employee had knowledge of said

claim. Failure to submit a claim within said thirty (30) days shall automatically bar any such claim from being presented to or against said Carrier either under this Agreement or otherwise: provided, however, that in the case of separate agreements, express or implied, between Employers and employees contrary to the terms of this Supplement or the Agreements, the thirty (30) days' limitation shall not apply. Where a State Committee has by prior agreement set a different time limitation, it shall continue.

Section 2.

Notwithstanding anything herein contained, it is agreed that in the event any Employer is delinquent at the end of a period in the payment of his contribution to the Health & Welfare or Pension Fund or Funds created under this Agreement, in accordance with the rules and regulations of the Trustees of such Funds, after the proper official of the Local Union has given seventy-two (72) hours' notice to the Employer of such delinquency in health & welfare and pension payments, the Local Union or Area Conferences, shall have the right to take such action as they deem necessary until such delinquent payments are made, and it is further agreed that in the event such action is taken, the Employers shall be responsible to the employees for losses resulting therefrom.

ARTICLE 8.

NATIONAL GRIEVANCE PROCEDURE

Section 1.

All grievances or questions of interpretations arising under this National Master Freight Agreement or Supplemental Agreements thereto shall be processed as set forth below. If such Supplemental Agreements provide for arbitration of discharges, such procedure shall be continued.

(a) All factual grievances or questions of interpretation arising under the provisions of the Supplemental Agreement (or factual grievances arising under the National Master Freight Agreement), shall be processed in accordance with the grievance procedure of the applicable Supplemental Agreement.

If upon the completion of the grievance procedure of the Supplemental Agreement the matter is deadlocked, the case shall be immediately forwarded to both the employer and the union secretaries of the National Grievance Committee, together with all pertinent files, evidence, records and committee transcripts.

Any request for interpretation of the National Master Freight Agreement shall be submitted directly to the Conference Joint Area Committee for the making of a record on the matter, after which it shall be immediately referred to the National Grievance Committee. Such request shall be filed with both the union and the employer secretaries of the National Grievance Committee with a complete statement of the matter.

Claimed violations of either Article 9 - Protection of Rights, Article 29 - Substitute Service and Article 32 - Subcontracting, shall be filed directly with the appropriate Conference Joint Area Committee. The Conference Joint Area Committee shall have the authority to render a final and binding decision or direct the grievance to the appro-

priate lower level committee for hearing if the grievance is not properly claimed under the provision of either Article 9, Article 29, or Article 32. The Conference Joint Area Committee must hear and decide such cases within sixty (60) days of the filing of the grievance. In the event of a deadlock, the National Grievance Committee, upon request by either party, shall convene a specially called National Grievance Committee meeting to decide such dead-locked cases, in which event a complete record of the matter shall be made for referral to the National Grievance Committee. Grievances arising under this paragraph shall be expeditiously processed and may be heard at either regularly scheduled or specially called hearings. A grievance may be filed by any Area Conference whose members are adversely affected by an alleged violation of Article 32, Section 4(b) occurring within its jurisdiction.

(b) Any matter which has been referred pursuant to Section 1(a) above, or any question concerning the interpretation of the provisions contained in the National Master Freight Agreement, shall be submitted to a permanent National Grievance Committee which shall be composed of an equal number of employer and union representatives. The National Grievance Committee shall meet quarterly, for the disposition of grievances referred to it, or may meet at more frequent intervals, upon call of the chairman of either the employer or union representatives on the National Grievance Committee. The National Grievance Committee shall adopt rules of procedure which may include the reference of disputed matters to subcommittees for investigation and report, with the final decision or approval, however, to be made by the National Grievance Committee. If the National Grievance Committee resolves the dispute by a majority vote of those present and voting, such decisions shall be final and binding upon all parties.

Cases involving discharge or suspension which are deadlocked by the National Grievance Committee may, by majority vote, be referred to arbitration. Procedures relat-

ing to such referrals shall be included in the Rules of Procedure of the National Grievance Committee.

If the National Grievance Committee is deadlocked on the disposition of the dispute, then either party shall be entitled to all lawful economic recourse to support its position in the matter. In considering factual disputes that are deadlocked or deadlocked questions of interpretation arising out of Supplemental Agreements, the decision of the National Grievance Committee shall be based on the provisions of the applicable Supplemental Agreement.

The Employer may request the Co-chairman of the National Grievance Committee to appoint and convene a joint Employer and Union Committee which shall have the authority to approve uniform dispatch procedures and rules which shall apply to the individual company's over-the-road operations.

MOTION FILED

AUG 19 1996

No. 96-111

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CENTRAL CARTAGE CO.,

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and HOWARD McDOUGALL, Trustee, and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND and HOWARD MCDOUGALL, Trustee,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The National Association for Dispute Resolution, Inc. ("NADR") respectfully moves, pursuant to Rule 37 of the Rules of this Court, for leave to file the annexed brief *amicus curiae* in support of the petition for a writ of certiorari. The consent of counsel for the Petitioner has been obtained. Consent of counsel for the Respondents was sought but not obtained as counsel was unavailable at press time.

recently became aware of the Seventh Circuit's decision refusing jurisdiction to review denials of motions to compel arbitration. In the event that a Writ for Certiorari is issued by this Court, NADR intends to seek leave to file an amicus brief in support of granting appellate jurisdiction to review denials of motions for arbitration. NADR is involved as the arbitration body in many arbitration proceedings and can bring the perspective of the disinterested decision maker to this Court's deliberations.

The NADR is justly concerned that the policy considerations and benefits of arbitration will be lost when a party who is entitled to arbitration is denied that right by a federal district court and then is subsequently forced to go through an entire course of litigation before a federal appellate court will review the district court's denial of arbitration. Such is the result now in the Seventh Circuit and other circuits though better reasoned decisions allowing review at the interlocutory stage have emanated from certain other circuit courts of appeals.

Wherefore, NADR respectfully moves this Court to grant NADR leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit erred in not following precedents of the Fourth and Eighth Circuits and *dicta* of the Ninth Circuit and instead followed precedent from the Eleventh Circuit refusing jurisdiction under 28 U.S.C. § 1292(a)(1) to review an interlocutory order of a district court which denied Central Cartage's motion to compel arbitration.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The National Association for Dispute Resolution, Inc. ("NADR") submits this brief as *amicus curiae* in support of the petition for a writ of certiorari and urges that this Court review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Co., 84 F.3d 988 (7th Cir. 1996).

PRELIMINARY STATEMENT

Arbitration has become an important alternative to traditional litigation for a multitude of reasons. Speed of resolution, finality of decisions from appeals and consequent savings in attorneys fees are chief among those reasons. These benefits are effectively repudiated when a denial of arbitration rights cannot be reviewed until the conclusion of all court proceedings.

INTEREST OF *AMICUS CURIAE*

NADR is involved as the arbitration body in many arbitration proceedings and can bring the perspective of the disinterested decision maker to this Court's deliberations. NADR is a national mediation service which is peculiarly interested in the issue raised in the Petition. The organization recently became aware of the Seventh Circuit's decision refusing jurisdiction to review denials of motions to compel arbitration. In the event that a Writ for Certiorari is issued by this Court, NADR intends to seek leave to file an amicus brief in support of granting appellate jurisdiction to review denials of motions for arbitration.

THE PROCEEDING BELOW

On May 3, 1995, the United States District Court for the Northern District of Illinois denied Petitioner's motion to compel arbitration on the basis that Petitioner had waived its right to its alternative dispute resolution mechanism.

Petitioner filed its Notice of Appeal on June 13, 1996 contending that appellate jurisdiction existed in the United States Court of Appeals for the Seventh Circuit under 28 U.S.C. §1292(a)(1) (as the orders served as an injunction against arbitration) and under 9 U.S.C. § 16 (as a denial of arbitration under the Federal Arbitration Act).

The Seventh Circuit entered its decision dismissing Petitioner's appeal for lack of appellate jurisdiction in Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Co., 84 F.3d 988 (7th Cir. 1996).

ARGUMENT

The Seventh Circuit's decision furthers the split among the various Circuit Courts of Appeal on appellate jurisdiction over interlocutory orders relating to arbitration pursuant to 28 U.S.C. §1292(a)(1) which has occurred since this Court issued its opinion in Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988). Currently, the geographic location of the litigants determines whether their Court of Appeals will review orders denying them their right to arbitrate.

Appellate review of will not burden the courts. Many litigant already have the right to appellate review under 28 U.S.C. §1292(a)(1) because the Court of Appeals for their Circuit does not follow the recent holding of the Seventh Circuit. Further, appellate review may alleviate the burden upon the district courts of going forward with a piece of litigation when the district court has denied arbitration and the court of appeals finds such denial to have been erroneous.

CONCLUSION

The NADR would ask this Court to issue its Writ of Certiorari to review the Seventh Circuit's decision and to guarantee litigants outside the Federal Arbitration Act that their right to appellate protection of arbitration rights does not depend on their geographic location within the Federal Court of Appeals system.

The NADR respectfully requests that this Court grant Petitioner's petition for a writ of certiorari.

Respectfully submitted,

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REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Central Cartage Co. ("Cartage" or "Petitioner") respectfully states as follows for its Reply Memorandum in support of its petition to this Court to issue a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit entered on May 28, 1996.

A.
Summary of Reply

Respondents, the Central States, Southeast and Southwest Areas Pension Fund and Central States Southeast and Southwest Areas Health and Welfare Fund and Howard McDougall, Trustee ("Funds") argue that a writ of certiorari should not issue (i) because the question presented is not important enough for review since only those outside the Federal Arbitration Act are disenfranchised from appellate review and (ii) because the Funds hope to obscure the split of authority among the Circuits which the Seventh Circuit stated that its decision furthered. Neither argument is appropriate.

B.
Without a Finding of Appellate Jurisdiction Under Section 1292(a)(1), All Litigants Outside the Reach of the Federal Arbitration Act Would Be Deprived of Effective Appellate Rights

The Funds admit that the Federal Arbitration Act ("FAA") expressly provides to litigants appellate jurisdiction to review denials of motions for arbitration. In fact, the FAA was amended to expressly provide those rights following this Court's decision in Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988). The petition seeks to give the

same rights to litigants such as Cartage who find themselves outside the scope of the FAA.[1]

The Funds cite cases in which this Court has refused to issue a writ of certiorari to review interlocutory orders or has

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[1] Numerous other transactions fall outside of the Federal Arbitration Act, thus making 28 U.S.C. §1292 fully and solely applicable to a great many cases involving the appealability of an order granting or denying arbitration rights in connection with these cases. Where interstate commerce is not primarily involved, the FAA is not applicable even in situations having some arguable effect on interstate commerce. See Bryant-Durham Electric Co. v. Durham County Hosp. Corp., 256 S.E.2d 529 (N.C. App. 1979)(FAA did not apply to action relating to construction of building even where some materials used to perform contract were shipped in interstate commerce); see also Office & Professional Employees Int'l Union, Local 2 v. Washington Metropolitan Area Transit Authority, 724 F.2d 133 (D.C. Cir. 1983)(FAA did not apply to compact between District of Columbia and neighboring state regarding mass transit system and requiring all labor disputes to be submitted to arbitration).

Further, the FAA is not applicable to certificates of public convenience and necessity issued by the Federal Power Commission. Gulf Oil Corp. v. Federal Power Comm'n, 563 F.2d 588 (3rd Cir. 1977) cert. denied 434 U.S. 1062 (1978). The FAA has been found to be inapplicable to a suit brought by administratrix of insured against the insurer for interpretation of arbitration clause within liability policies. Booth v. Seaboard Fire & Marine Ins. Co., 285 F. Supp. 920 (D. Neb. 1968) rev'd on other grounds, 431 F.2d 212 (8th Cir. 1969). The FAA has also been found to be inapplicable to an age discrimination suit brought by a registered representative against a securities dealer where the representative's agreement to arbitrate was not contained in an employment agreement but in his registration with the National Association of Securities Dealers. Williams v. Cigna Financial Advisors, 56 F.3d 656 (5th Cir. 1995).

Also, by its express terms, the FAA is not applicable to workers engaged in interstate commerce, so a retaliatory discharge action brought by a truck driver against a trucking company was found to be not subject to the FAA. Rosen v. Transx, Ltd., 816 F. Supp. 1364 (D. Minn. 1993).

otherwise commented on the issuance of such a writ[2], but none of the cases involve dismissal by a Court of Appeals for lack of jurisdiction.[3] This exercise is apparently to suggest that because the appeal is interlocutory, the importance of the

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[2] The cases cited by the Funds involve issues such as the appointment of a receiver (American Constr. Co. v. Jacksonville, T. & K.W.R. Co., 148 U.S. 372 (1893)) and the issuance of an injunction against the use of a trademark (Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916)). Moreover, Justice Stevens' dissent in Estelle v. Gamble, 429 U.S. 97, 115 (1976) was qualified by his recognition that "all the Courts of Appeals to consider the question [involved in that case] have reached substantially the same conclusion as the Court adopts", a situation not present in the case at bar.

In fact, the Funds do not contest the jurisdiction of this Court to review the decision of the Seventh Circuit.

[3] This Court has jurisdiction to review an appellate court's decision to dismiss an appeal for lack of jurisdiction. This Court has held that

> There can be no serious doubt concerning our power to review a court of appeals' decision for lack of jurisdiction - a power we have exercised routinely . . . . If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court.

Nixon v. Fitzgerald, 457 U.S. 731, 743 n. 23 (1982)(citation omitted). In the Nixon case, the Court of Appeals for the District of Columbia Circuit dismissed petitioner's appeal for lack of jurisdiction. As Cartage did herein, petitioner in Nixon invoked this Court's jurisdiction under 28 U.S.C. §1254(1). In analyzing its jurisdiction under the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), this Court concluded that "the case was 'in' the Court of Appeals under § 1254 and properly within our certiorari jurisdiction." Nixon, 457 U.S. at 743.

substantive rights the appeal seeks to establish are somehow diminished.

This Court has issued writs of certiorari under Section 1292(a)(1) before. See, e.g., Gardner v. Westinghouse Broadcasting Co., 434 U.S. 984 (1977).[4] Indeed, it has been clearly recognized by the leading Supreme Court commentator that "a conflict of decisions as to the appealability or finality of a particular type of lower court order can justify the grant of certiorari . . . ." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE, § 4.18 at 197 (7th ed. 1993).[5]

The Seventh Circuit's stay of its mandate to allow this Court to consider the issue presented and the numerous conflicting decisions among the various circuits belie the Funds' claim that the issue is not important and rarely arises.

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[4] Certiorari was granted on whether the denial of class certification could be immediately appealed as an order refusing an injunction under 28 U.S.C. §1292(a)(1). The Court ultimately held that a denial of class certification was not immediately appealable. Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 482 (1978). However, the decision is significant in demonstrating this Court's willingness to grant certiorari after a court of appeals decision finding a lack of appellate jurisdiction. Without interlocutory review of decisions such as the one at issue in this case, dismissals for lack of jurisdiction would indeed be "insulated entirely from review by this Court." Nixon, 457 U.S. at 743 n. 23.

[5] See also Carroll v. United States, 354 U.S. 394 (1957) (certiorari granted to review the appealability of a federal criminal suppression order analyzing, among other bases for jurisdiction, 28 U.S.C. §1291); and DiBella v. United States, 369 U.S. 121 (1962)(Court considered "the appealability of an order granting or denying a pretrial motion to suppress the evidentiary use . . . of material allegedly procured through an unreasonable search and seizure." Id. at 121-22).

As recognized by the Seventh Circuit in a case cited by the Funds,

> §1 of the Arbitration Act, 9 U.S.C. §1, excludes from its coverage - and therefore from the jurisdictional rules of §16 - "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Several of the circuits have concluded that this language places collective bargaining agreements outside the Arbitration Act. . . . In Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n. 2, 114 L.Ed. 2d 26, 111 S. Ct. 1647 (1991), the Supreme Court noticed the issue but left it unresolved. If collective bargaining agreements are indeed excluded by §1, then courts must continue to wrestle in labor cases with questions of appellate jurisdiction under §1292.

Briggs & Stratton Corp. v. Local 232 Int'l Union, Allied Indus. Workers, 36 F.3d 712 (7th Cir. 1994), cert. denied, 115 S. Ct. 1998 (1995)(citations omitted). The inapplicability of the FAA to collective bargaining agreements leaves open a vast set of potential appellants whose future litigation conduct is being guided by their geographic situs.

One such case involving a collective bargaining agreement, Tejidos de Coamo, Inc. v. Int'l Ladies Garment Workers' Union, 22 F.3d 8 (1st Cir. 1994), was cited in the Briggs & Stratton case as but one example of Section 1292 continuing as a viable statutory vehicle for appellate review of orders concerning arbitration. In Tejidos, the plaintiff sued certain unions seeking, among other things, a stay of pending arbitration proceedings. The First Circuit recognized that

several other circuits hold that "an order refusing to stay an arbitration proceeding *is not* immediately appealable under 28 U.S.C. §1292(a)(1)" and also recognized that "[a]t least six other circuits treat an order staying arbitration as an injunction that *is* immediately appealable." Id. at 10 (emphasis added). The court also discussed the 1988 amendment to the Federal Arbitration Act:

> A 1988 amendment to the Federal Arbitration Act, now 9 U.S.C. §16(a)(2), - although perhaps formally not applicable to this case - expresses a congressional policy in favor of immediate appeal of an "interlocutory order granting . . . an injunction against an arbitration that is subject to this title."

Id.

The First Circuit in Tejidos ultimately concluded that "an order declining to stay an arbitration is an injunction but for policy reasons is not immediately reviewable by appeal" but "an order staying arbitration is an injunction that is immediately appealable under 28 U.S.C. §1292(a)(1), *even where section 16 of the Federal Arbitration Act does not apply to the particular order*." Id. at 11(emphasis added).

The Tejidos decision underscores both the continued viability of appeals of arbitration orders under 28 U.S.C. §1292(a)(1) and the continued confusion among the circuits as to the appealability of arbitration orders outside of the Federal Arbitration Act.

The Seventh Circuit's order dismissing Cartage's appeal for lack of jurisdiction is reviewable by this Court despite its interlocutory status. Further, the decision of the Seventh

Circuit in this case to stay its mandate pending this Court's review of the issue raised in the petition together with prior decisions of this Court support the issuance of a writ of certiorari.

C.
The Fund's Attempt to Suggest that the Split Among the Circuits Does Not Exist for Purposes of this Case is Disingenuous

Whether or not the Funds are willing to concede that there is a split in authority among the Circuit Courts of Appeals whether denials of motions for arbitration are appealable under Section 1292(a)(1), one thing remains crystal clear -- the Seventh Circuit recognized that whether appellate jurisdiction is available under Section 1292(a)(1) would be resolved differently in the Seventh Circuit than in the Fourth or Eighth Circuits:

> . . . [W]e decline to follow the Fourth and Eighth Circuits and reaffirm our holding in Ohio-Sealy et al.

(Pet. App. 15a). If that were not clear enough, the Seventh Circuit subsequently stayed its own mandate until this Court had the opportunity to address the issue.

The Funds attempt to obscure the split among the circuits by speculating whether other circuits would apply the facts of this case in a manner in conjunction with the decision of the Seventh Circuit. First, the self-directed speculation of the Funds is no more than that. Second, the Seventh Circuit made it clear that it interprets the decisions of the Fourth and Eight Circuits differently than those circuits. There is a

conflict. No sophistry of the Funds can make the conflict go away.[6]

The Funds also argue that a grievance panel is incapable of resolving the dispute between the parties. That is simply wrong. The Funds state that in a separate case from the one at bar, a union demand for arbitration was met with Cartage's objection to arbitration based upon an ongoing federal court action against Cartage involving the same issues. (Res. App. 2a-3a). The grievance panel deadlocked on whether the grievance was jurisdictionally proper given the pending federal court action. (Res. App. 7a). Without the procedural obstacle of a pending federal court action involving the same issues, there is no reason that the grievance committee would not hear and resolve the dispute between the parties herein quickly and economically.

The Funds' argument concerning the effectiveness of the grievance panel and its remaining arguments concerning the availability of defenses at arbitration hearings and ERISA policy considerations are red herrings raised by the Funds to divert attention from the Seventh Circuit's recognition that a clear conflict of authority exists among the circuits. These additional issues should be addressed by the lower courts or by a grievance committee and not by this Court. This Court has only been asked explicitly by Cartage and invited implicitly by the Seventh Circuit, through its stay of its mandate, to address

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[6] Moreover, the holding of the other circuits with respect to irreparable consequences simply *conclude* that orders granting or denying arbitration "have an injunctive effect and have 'serious, perhaps irreparable consequences,'" but do not require appellants to make individual showings as to whether they would suffer such irreparable consequences. Kansas Gas & Elec. Co. v. Westinghouse Elec. Co., 861 F.2d 420, 422 (4th Cir. 1988); see also Nordin v. Nutri/System, Inc., 897 F.2d 339, 342 (8th Cir. 1990).

the appealability of orders denying arbitration under 28 U.S.C. §1292(a)(1).

CONCLUSION

In light of the clear conflict among the circuits on the issue presented and the Seventh Circuit's consideration of the issue as important enough to grant a stay of its own mandate, Central Cartage respectfully requests that this Court grant Central Cartage's Petition for a writ of certiorari.

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